



State of West Virginia  
Office of the Attorney General

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Via E-mail and Regular Mail

Ryan P. Simonton, Esq.  
Counsel to the City of Morgantown  
389 Spruce Street  
Morgantown, WV 26505

Re: Proposed Community Police Review and Advisory Board

Dear Mr. Simonton:

Thank you for sending me the draft *Ordinance Establishing A Civilian Police Review and Advisory Board* that the Special Committee presented to the City Council Committee of the Whole on January 26, 2021, that calls for the establishment of a Community Police Review and Advisory Board, as well as your February 10, 2021 letter discussing some of the issues involved in this matter.

As noted in my previous letter, I applaud the Council for its efforts to protect both public safety and the rights of the City's citizens to express their First Amendment rights in a peaceful, non-violent manner. It appears the Special Committee actively solicited the public's input while openly discussing these issues, and that the City Council prudently delayed taking formal action on the draft Ordinance until it could obtain my feedback on its contents, demonstrating the seriousness with which they approached this project. However, it remains the opinion of the Office of the Attorney General that the Morgantown City Council does not have the legal authority to enact any municipal ordinance purporting to conduct investigations or hearings in connection with complaints relating to members of the Morgantown Police Department, as any such ordinance would directly conflict with the express provisions of W.Va. Code § 8-11-1(a)(2), § 8-14-6, § 8-14-20, § 8-14-23, and §§ 8-14-A-1, *et seq.* as explained in detail in my previous letter.

The authors of an exhaustive study regarding the scope and effect of the various Law Enforcement Officer Bill of Rights (“LEOBOR”) statutes in place around the country<sup>1</sup> concluded that West Virginia’s LEOBOR appears “to completely replace” the State’s separate laws governing disciplinary hearings for public employees.<sup>2</sup> Any provisions of Morgantown City Code that purport to allow a civilian police review board to investigate citizen complaints against the City’s police officers before the completion of the Morgantown Police Department’s internal investigation of such complaints – including, but not limited to Section 137.01 – are pre-empted by state law. In fact, the Florida Supreme Court reached that conclusion in the *D’Agastino* case you cited, noting that the Civil Investigative Panel’s investigative authority was largely limited to reviewing the results of completed Internal Affairs investigations while the Court also voided the panel’s power to subpoena police officers. In *Charleston Gazette v. Smithers*, 232 W.Va. 449, 752 S.E.2d 603 (2013), the West Virginia Supreme Court noted privacy concerns in ruling that information related to an internal investigation or inquiry regarding alleged police misconduct was exempt from public release through the Freedom of Information Act until “after the completion of the (internal) investigation . . . and a determination is made (regarding disciplinary action).”<sup>3</sup>

We have grave concerns that any attempt by the City Council to create a Civilian Police Review and Advisory Board – even one that is stripped of the investigative and quasi-judicial powers outlined in Sections 181.05(e) and (g) of the draft Ordinance – will still run afoul of the Legislature’s intention expressed in W.Va. Code § 8-14-23 “to furnish a complete and exclusive system for the appointment, promotion, reinstatement, removal, discharge, suspension and reduction of all members of all paid police departments subject to the civil service provisions of this article.” As we previously noted, the Legislature has repeatedly refused to amend the W.Va. Code to vest municipal corporations with the legal authority to create a “local police review board” similar to the Board envisioned in the draft Ordinance.<sup>4</sup> In another case, our State’s Supreme Court held that “the Legislature’s repeated refusal to amend (a statute in a proposed manner) is undoubtedly indicative of its intent” regarding the proper interpretation of that statute. *State v. Butler*, 239 W.Va. 168, 175, 799 S.E.2d 718, 725 (2017). Thus, even if the City Council removed the most problematic provisions from the draft Ordinance, the application of that judicial precedent may require the remainder of the draft Ordinance to be struck down if enacted.

Finally, we have reviewed your recitation of the various ordinances creating civilian police review boards that have been passed by municipalities in several other States where statutes are also in place. Although you noted that “some differences exist in the language of the authorizing

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<sup>1</sup> Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officer’s Bill of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005).

<sup>2</sup> *Id.* at 223; see endnote 220 (emphasis added).

<sup>3</sup> *Id.* at Syllabus Point 11.

<sup>4</sup> See H.B. 2031, \_\_\_ Leg., Reg. Sess. (W.Va. 1997); H.B. 2031, \_\_\_ Leg., Reg. Sess. (W.Va. 1998); H.B. 2762, 74<sup>th</sup> Leg., Reg. Sess. (W.Va. 1999); H.B. 4179, \_\_\_ Leg., Reg. Sess. (W.Va. 2000); H.B. 2237, \_\_\_ Leg., Reg. Sess. (W.Va. 2001); H.B. 2237, \_\_\_ Leg., Reg. Sess. (W.Va. 2002); H.B. 2430, \_\_\_ Leg., Reg. Sess. (W.Va. 2003); H.B. 2430, \_\_\_ Leg., Reg. Sess. (W.Va. 2004); H.B. 2920, 84<sup>th</sup> Leg., Reg. Sess. (W.Va. 2019); and H.B. 2920, 84<sup>th</sup> Leg., Reg. Sess. (W.Va. 2020). See also H.B. 4125, \_\_\_ Leg., Reg. Sess. (W.Va. 2004)(state police review board) and S.B. 272, \_\_\_ Leg., Reg. Sess. (W.Va. 2004)(state police review board);

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legislation among these states,” there is one important aspect of West Virginia’s LEOBOR that appears to be completely unique and not present in any of the other thirteen LEOBOR statutes you cited: The complete and exclusive system language set forth in W.Va. Code § 8-14-23. Lacking such an overarching, clear and decisive statement of legislative intent underlying the enactment of other States’ LEOBOR statutes, it is possible cities in those States may be allowed to create such civilian police review boards – such as in Minnesota, where Minn. Stat. Ann. § 626.89 specifically permits such review boards. However, that is not the case in our State.

I hope this opinion persuades the Council to take no action in this matter that would violate West Virginia law.

Best regards,



Patrick Morrissey  
West Virginia Attorney General